IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
CHAMBER SUMMONS NO.189 OF 2004
IN
CAVEAT NO.2 OF 2004
IN
TESTAMENTARY SUIT NO.2 OF 2004
IN
PETITION NO.633 OF 1989

Petition for the Probate of the Last Will and Testament and codicil of Pranjivan Jasraj Gandhi .....Deceased

Chandrakant J.Shah .. ..Petitioner
Versus
Lalitchandra J.Juthani & Anr. .. ..Caveators

Mr.Girish Desai with Giren Pandit for petitioner
Mr.H.J.Thakkar with Kumaresh Purohit i/b Purohit & Purohit for Caveators

CORAM : S.J.VAZIFDAR, J.

DATE : 28TH FEBRUARY, 2006

ORAL JUDGMENT :

1. The petitioner/plaintiff has taken out the above Chamber Summons. The Plaintiff seeks an order dismissing the Caveat dated 13.1.2004 filed by the Caveator one Kanak Ramniklal Shah. The plaintiff has also prayed that he may be granted probate as per an order dated 27.2.2003.

2. The above petition was filed for probate of a Will dated 11.2.1988 made by one Pranjivan Jasraj Gandhi (herein after referred to as "the Deceased") who expired on 27.1.1989. By the said Will the deceased in effect revoked an earlier Will dated 16th October, 1984 and a Codicil thereto dated 15.6.1986 which were registered on 24.2.1986 and 7.1.1988 respectively. The deceased bequeathed to the plaintiff inter alia, an immovable property occupied by tenants at Chembur, Mumbai, Room No.7 in a building at Mumbai, cash in the bank account of the deceased, furniture and jewellery. The residuary clause is also in favour of the plaintiff. Thus the plaintiff is the sole beneficiary under the said Will. However, the plaintiff was directed to manage the property out of the money received from the said immovable property.

3. (a) The above petition was filed on 23.10.1989. On 20.9.1990 one Dharsi Mehta and one Vanechand Mehta filed Caveats and their affidavits in support of the Caveats. In view thereof on 27.9.1990 the above petition was converted into Testamentary Suit No.41 of 1990. In October - November, 1990 further

Caveats were also filed.

(b) By an order dated 18.3.1991 in Notice of Motion No.466 of 1991, taken out by the plaintiff in the above petition, the Court Receiver was appointed with the consent of the parties in respect of the said building.

(c) On 18.11.1993 one of the Caveators, Dharsi Mehta expired. On 21.4.2000 the other Caveator, Vanechand Mehta also expired. By an order dated 17.7.2002 Chamber Summons No.111 of 2002 taken out by the plaintiff was made absolute and the heirs and next of kin of the deceased Caveators were brought on record as defendant nos.1a and 1b.

4. By an order dated 27.2.2003 J.A.Patil, J.(as he then was) inter-alia, recorded that the order dated 17.2.2003 (wrongly recorded 13.2.2003) had not been complied with by defendant nos.1a and 1b as they had not filed any affidavit adopting the contentions of the deceased Caveators. The learned judge therefore presumed that the legal heirs did not propose to press the caveats and that they had no objection to the probate being granted to the petitioner. By the said

order the learned Judge therefore reconverted the suit into a petition and ordered that it be treated as an uncontested petition. At the hearing none of the defendants had appeared.

5. Pursuant to the order dated 27.2.2003 a drawn up order was prepared on 4.1.2004. The drawn up order records some of the aforesaid facts and continues as follows :

> "AND THIS COURT DOTH FURTHER ORDER that upon the petitioner/plaintiff complying with the requisitions of the Prothonotary & Senior Master, High Court, Bombay and upon payment of Probate Court fees if any the Probate of the Last Will and Testament dated 11th February 1988 of the said deceased Pranjivandas Jasras Gandhi be issued to the petitioner/plaintiff having effect throughout the State of Maharashtra."

6. On 13.1.2004 the respondent filed the present Caveat, which the plaintiff seeks to have dismissed.

7. I will now refer to the facts connected with the

petition filed by the respondents.

8.(a) On 9.1.2004 the present Caveators, Lalitchandra Jagjivandas Juthani and Kanak Ramniklal Shah filed Probate Petition No.45 of 2004 for probate of the said Will dated 16.10.1984 and a codicil thereto dated 24.2.1986. As stated above the deceased expired on 27.1.1989. Under the alleged Will dated 16.10.1984 the Caveators have been appointed as trustees. The other trustees appointed under the Will were one Premnath Rajaram Agarwal, one Chandrakant Vanechand Mehta and one Hitesh Dharsibhai Mehta.

(b). On 8.10.2003 the petitioners in the above petition filed a Caveat in Petition No.45 of 2004. Thereafter Petition No.45 of 2004 was converted into a suit and numbered as Suit No.19 of 2005.

9. Mr.Desai, the learned counsel appearing on behalf of the plaintiff, submitted that the respondents have no caveatable interest. He further submitted that even assuming that the respondents have a caveatable interest, in view of the order dated 27.2.2003 and in view of the order drawn up pursuant thereto on dated

4.1.2003, the caveat is not maintainable.

10. I am unable to agree with Mr. Desai's submission that the respondents being only executors of and not beneficiaries under a Will have no caveatable interest. The basis of this submission is that to support a Caveat, a Caveator must have an interest in the estate in his personal capacity and not in a representative capacity.

11. Shri S.J.Thakkar, the learned Senior Counsel appearing on behalf of Caveators relied upon the judgment in the case of **Swatantranandji vs. Lunidaram Jangaldas reported in XXXIX The Bombay Law Reporter page 490**. In that case after scrutinising the documents the learned judge came to the conclusion that the words therein did not clearly indicate that the testatrix intended to appoint the defendant as her executor. The learned judge went on to hold as under :

> "The question still remains whether the defendant has sufficient interest in the estate of the deceased for him to sustain his caveat. A caveat can be entered by any person having or

asserting an interest in the estate of a deceased person, and it has been held that he must show that he has that interest by inheritance or otherwise. A title adverse to that of the testator or to his estate or any portion thereof is not sufficient to sustain the interest. I think that the test is generally this, will the grant of probate to the petitioner displace any right to which the caveator is otherwise entitled? If so, he has an interest; if not, he has none. At best the defendant can argue, though the point is not taken by him in his affidavits, that he is the executor according to the tenor of the later will. If he succeeds in proving that the first will is a forgery, he may show that he is the executor according to the tenor of the later will, and as such he would have a right to apply for probate to the estate of the deceased. To that extent it can be argued that an important right belonging to him may be displaced by reason of the grant of probate to the petitioner. The point is not free from doubt; but I would still hold that the defendant has an

> interest in the estate which enables him to oppose the grant of probate of the two wills to the petitioner." (emphasis supplied)

The ratio of the judgment is clear. The learned judge has clearly held that if the defendant was appointed as an executor he would be held to have an interest in the estate of the deceased.

12. I am not only bound by but am in respectful agreement with the judgment and would only add a few reasons of my own.

13. There is nothing in the Indian Succession Act which suggests that a Caveat may be maintained only by a person who has an interest in the estate in his personal capacity. Mr. Desai has in any event not invited my attention to any such provision or to the enunciation of such a principle in any judgment, text or laws.

14. On the other hand the provisions of Section 211(i) of the Indian Succession Act indicate the contrary. Section 211 reads as under :

> 211. Character and property of executor or administrator as such - (1) The executor or administrator, as the case may be, of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such.
>
> (2) When the deceased was a Hindu, Mohammedan, Buddhist, (Sikh Jaina or Parsi) or an exempted person, nothing herein contained shall vest in, an executor or administrator any property of the deceased person which would otherwise have passed by survivorship to some other person.

15. In **Pandurang Shamrao Laud and ors. vs Dwarkadas Kalliandas & ors. - AIR 1933 Bombay 342** it was held as under -

> "Under Section 211, Succession Act, an executor is the legal representative of the deceased for all purposes, and all the property of the deceased vests in him even before probate is granted. The probate of a will is operative only as the authenticated evidence of the

executor's title and not as the foundation thereof, for he derives his title from the will itself, and the property of the deceased vests in him from the moment the testator dies. Under S.213 however no right as executor can be established in any Court of justice without inter alia a grant of probate, and under S.214 no Court can pass a decree against an heir of a deceased person for payment of his debt to any person who does not hold either probate or letters of administration or a succession certificate. It follows therefore that an executor before he proves the will may do almost all acts which are incidental to his office except those relating to suits in connection with the estate; and when he has filed his petition for probate and the petition is turned into a suit as in this case, and while that suit is pending, there is no one legally entitled to receive or hold the assets or give valid discharges."

16. I would therefore hold that an executor of a Will even before the same is probated has an interest in

the estate and thereby a caveatable interest to oppose the grant of a probate of any will.

17. Accordingly, the first contention raised by Mr. Desai is rejected.

18. The next contention urged by Mr. Desai is that in view of the order dated 27.2.2003 passed by J.A.Patil, J. and in view of the drawn up order dated 4.1.2004 the probate was granted in favour of the plaintiff and that the caveat is not maintainable in view of Rule 401 of the High Court (O.S.) Rules, which reads as under :

> "401. Any person intending to oppose the grant of probate or letter of administration shall file a caveat in Form No.116 within fourteen days from the service of the citation upon him or within such shorter time as the Judge in Chambers may direct. Notice of the filing of the caveat shall be given by the Prothonotary and Senior Master to the petitioner or his Advocate on record. The Judge in Chambers may extend the time to file a caveat, provided the

grant has not in the meantime been issued."

19. The submission is not well founded. The order dated 27.2.2003 did not grant a probate. It merely provided that the suit be reconverted into a petition and that it should be treated as an uncontested petition. Rule 671 of the High Court (O.S.) Rules, reads thus -

> "671. When the appellate tribunal refers a case to the High Court, it shall give notice of that fact to the party at whose instance the reference has been made, and shall call upon him to take such steps in the office of the Prothonotary and Senior Master at Bombay or as may be necessary for bringing the reference to a final conclusion."

20. The role of the District Judge/Prothonotary and Senior Master is not that of a mere rubber stamp even in an administrative matters much less in matters concerning the grant of probates. The Prothonotary and Senior Master is bound to see that the entire procedure has been followed as prescribed inter-alia by Chapter

XXVI of the High Court (Original Side) Rules which pertain to the Testamentary and Intestate Jurisdiction. This is so even in uncontested proceedings.

21. For instance under Rule 419 the Prothonotary and Senior Master shall not grant probate of the will or letters of administration with the will annexed of any blind or obviously illiterate or ignorant person, unless he has satisfied himself that the said will was read over to the testator before its execution, and that the testator understood at such time the contents thereof. Under Rule 427 in case of doubt or difficulty in any non contentious matter, the Prothonotary and Senior master may refer the matter to the Judge in Chamber. This itself indicate that the grant of probate is not a mere mechanical or clerical task. It requiring no application of mind.

22. Even the portion of the drawn up order extracted above provides that it is only upon the petitioner complying with the requisitions of the Prothonotary and upon payment of probate court fees that the probate is to be issued. The expression "be issued" reasonably indicates that neither the order dated 27.2.2003 nor the

drawn up order dated 4.1.2004 constitute the grant of probate.

23. Though it is not decisive of the matter, it may be noted that the plaintiff himself did not consider either the order dated 27.2.2003 or the drawn up order dated 4.1.2004 to be a grant of probate. This is clear from prayer (b) of the Chamber Summons which reads as under -

> "(b) That the petitioner be granted the probate as per order dated 27.2.2003 without further delay."

Consequently in para 4 of the affidavit in support of the chamber summons the plaintiff has stated as under :

> "I say that all queries pursuant to the said order have been complied by me and now only the final notice and **probate is to be issued by the office in my favour**."

The plaintiff, I may only add, rightly, did not consider himself as having been granted the probate.

24. In these circumstances, the chamber summons is dismissed. There shall however be no order as to costs.

25. It is however, clarified that I have not dealt with the merits of the case in any manner whatsoever. I would also like to clarify that the question as to whether the office correctly accepted the Caveat and numbered the suit once again as a suit is kept open.